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The Freedom of Information Act¹ generally provides that any person has a right, enforceable in court, of access to federal agency records, except to the extent that such records (or portions thereof) are protected from disclosure by one of nine exemptions or by one of three special law enforcement record exclusions.

Enacted in 1966, the FOIA established for the first time an effective statutory right of access to government information. The principles of government openness and accountability underlying the FOIA, however, are inherent in the democratic ideal: "The basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."² The Supreme Court has emphasized that "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."³

This was emphasized in the statement of FOIA policy issued by President Clinton on October 4, 1993, in which he called upon all federal agencies to renew their commitment to the Act and to enhance its effectiveness as a vital mechanism of government openness and accountability:

For more than a quarter century now, the Freedom of Information Act has played a unique role in strengthening our democratic form of government. The statute was enacted based upon the fundamental principle that an informed citizenry is essential to the democratic process and that the more the American people know about their government the better they will be governed. Openness in government is essential to accountability and the Act has become an integral part of that process.⁴

To be sure, achieving an informed citizenry is a goal often counterpoised against other vital societal aims. Society's strong interest in an open government can conflict with other important interests of the general public--such as the public's interests in the effective and efficient operations of government; in the prudent governmental use of limited fiscal resources; and in the preservation of the confidentiality of sensitive personal, commercial, and governmental information. Though tensions among these competing interests are characteristic of a

¹ 5 U.S.C. § 552 (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West Supp. 1997).

² NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

³ United States Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 773 (1989).

⁴ President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) [hereinafter President Clinton's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 3.

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democratic society, their resolution lies in providing a workable formula that encompasses, balances, and appropriately protects all interests, while placing emphasis on the most responsible public disclosure possible.⁵ It is this task of accommodating countervailing concerns, with disclosure as the predominant objective, that the FOIA seeks to accomplish.

The FOIA evolved after a decade of debate among agency officials, legislators, and public interest group representatives. It revised the public disclosure section of the Administrative Procedure Act,⁶ which generally had been recognized as falling far short of its disclosure goals and had come to be looked upon as more a withholding statute than a disclosure statute.⁷

By contrast, under the thrust and structure of the FOIA, virtually every record possessed by a federal agency must be made available to the public in one form or another, unless it is specifically exempted from disclosure or specially excluded from the Act's coverage in the first place.⁸ The nine exemptions of the FOIA ordinarily provide the only bases for nondisclosure,⁹ and generally they are discretionary, not mandatory, in nature.¹⁰ (For a discussion of the discretionary nature of FOIA exemptions, and the making of discretionary disclosures as a matter of FOIA policy, see Discretionary Disclosure and Waiver, below.) Dissatisfied record requesters are given a relatively speedy remedy in the United States district courts, where judges determine the propriety of agency withholdings de novo and agencies bear the burden of sustaining their nondisclosure actions.¹¹

The FOIA contains six subsections, the first two of which establish certain categories of information that must automatically be disclosed by federal agencies. Subsection (a)(1) of the FOIA¹² requires disclosure through publication in the Federal Register of information such as descriptions of agency organizations, functions, procedures, substantive rules, and statements of general policy.¹³ This

⁵ See S. Rep. No. 89-813, at 3 (1965).

⁶ 5 U.S.C. § 1002 (1994).

⁷ See S. Rep. No. 89-813, at 5 (1965).

⁸ See NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 136 (1975).

⁹ See 5 U.S.C. § 552(d).

¹⁰ See Chrysler Corp. v. Brown, 441 U.S. 281, 293 (1979); see also, e.g., FOIA Update, Summer 1985, at 3 ("OIP Guidance: Discretionary Disclosure and Exemption 4").

¹¹ See 5 U.S.C. § 552(a)(4)(B)-(C); see also FOIA Update, Spring 1985, at 6.

¹² 5 U.S.C. § 552(a)(1).

¹³ See, e.g., Aulenback, Inc. v. Federal Highway Admin., 103 F.3d 156, 168 (D.C. Cir. 1997); Hughes v. United States, 953 F.2d 531, 539 (9th Cir.

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requirement provides automatic public access to very basic information regarding the transaction of agency business.¹⁴

Subsection (a)(2) of the FOIA¹⁵ requires that certain types of records--final opinions rendered in the adjudication of cases, specific policy statements, certain administrative staff manuals, and some records previously processed for disclosure under the Act--be routinely made "available for public inspection and copying."¹⁶ This is commonly referred to as the "reading room" provision of the FOIA,¹⁷ and it will soon provide for some such records to be made available by agencies in "electronic reading rooms" as well.¹⁸ (For a discussion of the operation of this FOIA subsection, see FOIA Reading Rooms, below).

The courts have held that providing official notice and guidance to the general public is the fundamental purpose of the publication requirement of subsection (a)(1) and the "reading room" availability requirement of subsection (a)(2).¹⁹ Failure to comply with the requirements of either subsection can result in invalidation of related agency action,²⁰ unless the complaining party had actual

¹³(...continued)

1992); NI Indus., Inc. v. United States, 841 F.2d 1104, 1107 (Fed. Cir. 1988); Bright v. INS, 837 F.2d 1330, 1331 (5th Cir. 1988); see also DiCarlo v. Commissioner, T.C. Memo 1992-280, slip op. at 9-10 (May 14, 1992) (publication in United States Government Manual, special edition of Federal Register, satisfies publication requirement of subsection (a)(1)(A) (citing 1 C.F.R. § 9 (1992))).

¹⁴ See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The 'Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)") (advising agencies to meet their subsection (a)(1) responsibilities on no less than quarterly basis).

¹⁵ 5 U.S.C.A. § 552(a)(2) (West 1996 & Supp. 1997).

¹⁶ Id. § 552(a)(2)(A)-(D).

¹⁷ See FOIA Update, Summer 1992, at 4.

¹⁸ See FOIA Update, Fall 1996, at 1-2 (discussing provisions of Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048); see also FOIA Update, Summer 1997, at 1-2 (describing agency development of World Wide Web sites for "electronic reading room" purposes).

¹⁹ See, e.g., Welch v. United States, 750 F.2d 1101, 1111 (1st Cir. 1985).

²⁰ See, e.g., Kennecott Utah Copper Corp. v. United States Dep't of the Interior, 88 F.3d 1191, 1203 (D.C. Cir. 1996) ("Congress has provided [a] means for encouraging agencies to fulfill their obligation to publish materials in the Federal Register" by "protect[ing] a person from being adversely affected" by an unpublished regulation.); Checkosky v. SEC, 23 F.3d 452, 459 (D.C. Cir. 1994); NI Indus., 841 F.2d at 1108; D&W Food Ctrs. v. Block, 786 F.2d 751, 757-58 (6th Cir. 1986); Anderson v. Butz, 550 F.2d 459, 462-63 (9th Cir. 1977); see also Texas Health Care Ass'n v. Bowen, 710 F. Supp. 1109, 1113-14, 1116 (W.D.

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and timely notice of the unpublished agency policy,²¹ unless he is unable to show that he was adversely affected by the lack of publication,²² or unless he fails to show that he would have been able to pursue "an alternative course of conduct" had the information been published.²³ However, unpublished interpretive guidelines that were available for copying and inspection in an agency program manual have been held not to violate subsection (a)(1),²⁴ and it also has been held that regulations pertaining solely to internal personnel matters that do not affect members of the public need not be published.²⁵ Of course, an agency is not

²⁰(...continued)
Tex. 1989).

²¹ See, e.g., United States v. F/V Alice Amanda, 987 F.2d 1078, 1084-85 (4th Cir. 1993) (statutory defense of subsection (a)(1) not available when defendant had copy of unpublished regulations); United States v. Bowers, 920 F.2d 220, 222 (4th Cir. 1990) (IRS's failure to publish tax forms did not preclude defendants' convictions for income tax evasion, as defendants had notice of duty to pay those taxes, duty is "manifest on face" of statutes, listing of places when forms can be obtained is published in Code of Federal Regulations, and defendants had filed tax returns before); Lonsdale v. United States, 919 F.2d 1440, 1447 (10th Cir. 1990); Tearney v. National Transp. Safety Bd., 868 F.2d 1451, 1454 (5th Cir. 1989); Bright, 837 F.2d at 1331; Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1018 (9th Cir. 1987); see also United States v. \$200,000 in United States Currency, 590 F. Supp. 866, 874-75 (S.D. Fla. 1984) (alternative holding) (published regulations adequately apprised individuals of obligation to use unpublished reporting form).

²² See, e.g., Lake Mohave Boat Owners Ass'n v. National Park Serv., 78 F.3d 1360, 1368 (9th Cir. 1996); Alliance for Cannabis Therapeutics v. DEA, 13 F.3d 1131, 1136 (D.C. Cir. 1994); Bowers, 920 F.2d at 222; Sheppard v. Sullivan, 906 F.2d 756, 762 (D.C. Cir. 1990); Nguyen v. United States, 824 F.2d 697, 702 (9th Cir. 1987); Coos-Curry Elec. Coop., Inc. v. Jura, 821 F.2d 1341, 1347 (9th Cir. 1987).

²³ Alliance for Cannabis Therapeutics, 15 F.3d at 1136 (quoting Zaharakis v. Heckler, 744 F.2d 711, 714 (9th Cir. 1984)).

²⁴ See McKenzie v. Bowen, 787 F.2d 1216, 1222-23 (8th Cir. 1986); see also Lake Mohave Boat Owners, 78 F.3d at 1368 (rate-setting guidelines found to be "an agency staff manual governed by § 552(a)(2)," requiring only public availability, not Federal Register publication under subsection (a)(1)); Capuano v. National Transp. Safety Bd., 843 F.2d 56, 57-58 (1st Cir. 1988); Pagan-Astacio v. Department of Educ., No. 93-2173, slip op. at 9 (D.P.R. June 1, 1995) (agency need not publish directory explaining existing regulation when it publishes Federal Register notice explaining where directory is available), aff'd, 81 F.3d 147 (1st Cir. 1996) (unpublished table decision); Medics, Inc. v. Sullivan, 766 F. Supp. 47, 52-53 (D.P.R. 1991); Sturm v. James, 684 F. Supp. 1218, 1223 n.6 (S.D.N.Y. 1988).

²⁵ See Hamlet v. United States, 63 F.3d 1097, 1103 (Fed. Cir. 1995) (pub-
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required to publish substantive rules and policy statements of general applicability that it has not adopted.²⁶

Under subsection (a)(3) of the FOIA--by far the most commonly utilized portion of the Act--all records not made available to the public under subsections (a)(1) or (a)(2),²⁷ or exempted from mandatory disclosure under subsec

²⁵(...continued)

lication not required for personnel manuals `related solely to the [agency's] internal personnel rules and practices'); Pruner v. Department of the Army, 755 F. Supp. 362, 365 (D. Kan. 1991) (Army regulation governing procedures for applications for conscientious objector status concerned internal personnel matters and not required to be published); see also Dilley v. National Transp. Safety Bd., 49 F.3d 667, 669-70 (10th Cir. 1995) (publication of policy regarding FAA's authority to suspend pilot certificates not required when statute clearly grants agency broad disciplinary powers); Lonsdale, 919 F.2d at 1446-47 (FOIA does not require publication of Treasury Department orders which internally delegate authority to enforce internal revenue laws). But see Smith v. National Transp. Safety Bd., 981 F.2d 1326, 1328-29 (D.C. Cir. 1993) (unpublished policy bulletin regarding sanctions not valid basis for suspension of license because sanctions policy affects public by altering public's behavior).

²⁶ See 5 U.S.C. § 552(a)(1); see, e.g., Xin-Chang Zhang v. Slattery, 55 F.3d 732, 749 (2d Cir. 1995) (reversing district court's order that agency give effect to unpublished rule after finding plaintiff adversely affected by lack of publication, when rule was to be effective only on date of publication and "[b]y its own terms, the [r]ule never became effective"); Clarry v. United States, 891 F. Supp. 105, 110-11 (E.D.N.Y. 1995) (failure to publish notice of ban for reemployment of strikers did not violate FOIA's notice requirement when rule was not "formulated and adopted" by agency but was authorized by presidential directive and by statute); Peng-Fei Si v. Slattery, 864 F. Supp. 397, 405 (S.D.N.Y. 1994) ("The FOIA cannot be used to force an agency to adopt a new regulation that it withdrew from publication for the specific purpose of determining whether or not it should be adopted."); Xiu Qin Chen v. Slattery, 862 F. Supp. 814, 822 (E.D.N.Y. 1994) ("[A]n agency cannot be bound by [an un]published rule in a situation in which the agency never actually adopted the rule."); cf. Kennecott, 88 F.3d at 1202-03 (FOIA does not authorize district court to order publication of regulation withdrawn by new administration before it could be published).

²⁷ See 5 U.S.C. § 552(a)(3) ("FOIA request" under subsection (a)(3) cannot be made for any records "made available" under subsections (a)(1) or (a)(2)); United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 152 (1989); Schwarz v. United States Patent & Trademark Office, No. 95-5349, 1996 U.S. App. LEXIS 4609, at *1 (D.C. Cir. Feb. 22, 1996); Hardy v. ATF, 631 F.2d 653, 657 (9th Cir. 1980); Reeves v. United States, No. 94-1291, slip op. at 3-4 (E.D. Cal. Nov. 10, 1994); see also FOIA Update, Winter 1995, at 2; FOIA Update, Summer 1992, at 4; FOIA Update, Spring 1991, at 5. But see FOIA Update, Winter 1997, at 3 (advising that while ordinary rule is that records placed in reading room under subsection (a)(2) cannot be subject of regular FOIA request, Congress made clear
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tion (b), or excluded under subsection (c), are subject to disclosure upon an agency's receipt of a proper access request from any person. (See discussions of the procedural aspects of subsection (a)(3) (including fees and fee waivers), the exemptions of subsection (b), and the exclusions of subsection (c), below.)

Subsection (c) of the FOIA,²⁸ added as a part of the Freedom of Information Reform Act of 1986,²⁹ establishes three special categories of law enforcement-related records that have been entirely excluded from the coverage of the FOIA in order to safeguard against unique types of harm.³⁰ The extraordinary protection embodied in subsection (c) permits an agency to respond to a request for such records as if the records in fact did not exist. (See discussion of the operation of these special provisions under Exclusions, below.)

Subsection (d) of the FOIA³¹ makes clear that the Act was not intended to authorize any new withholding of information, including from Congress. While individual Members of Congress possess merely the same rights of access as those guaranteed to "any person" under subsection (a)(3), Congress as a body (or through its committees and subcommittees) cannot be denied access to information on the grounds of FOIA exemptions.³²

Subsection (e) of the FOIA³³ requires an annual report to Congress from each federal agency regarding its FOIA operations and an annual report from the Department of Justice regarding both FOIA litigation and the Department of Justice's efforts (primarily through the Office of Information and Privacy) to encourage agency compliance with the FOIA.³⁴ As of the annual FOIA report for

²⁷(...continued)
that such rule does not apply to new subsection (a)(2)(D) category of FOIA-processed records) (citing H.R. Rep. No. 104-795, at 21 (1996)).

²⁸ 5 U.S.C. § 552(c).

²⁹ Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207, 3207-48.

³⁰ See generally Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act 18 (Dec. 1987).

³¹ 5 U.S.C. § 552(d).

³² See FOIA Update, Winter 1984, at 3-4 ("OIP Guidance: Congressional Access Under FOIA") (citing, e.g., H.R. Rep. No. 89-1497, at 11-12 (1966)); see also 5 U.S.C. § 552a(b)(9) (1994) (counterpart provision of Privacy Act of 1974); cf. Leach v. RTC, 860 F. Supp. 868, 878-79 & n.13 (D.D.C. 1994) (treating contrary statements in Murphy v. Department of the Army, 613 F.2d 1151, 1156-58 (D.C. Cir. 1979), as "mere dicta"), appeal dismissed per stipulation, No. 94-5279 (D.C. Cir. Dec. 22, 1994).

³³ 5 U.S.C.A. § 552(e) (West 1996 & Supp. 1997).

³⁴ See, e.g., FOIA Update, Summer/Fall 1993, at 8-9 (describing range of OIP
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fiscal year 1998 (due by February 1, 1999), agencies will prepare these reports for submission to the Department of Justice, which in turn will make them available to the public through a single World Wide Web site.³⁵

Subsection (f) of the FOIA³⁶ defines the term "agency" so as to subject the records of nearly all executive branch entities to the Act and defines the term "record" to include information maintained in an electronic format. (See discussions of the terms "agency" and "record" under Procedural Requirements, below.) Additionally, new subsection (g) of the FOIA³⁷ now requires agencies to prepare FOIA reference guides describing their information systems and their processes of FOIA administration, which may assist potential FOIA requesters.³⁸

As originally enacted in 1966, the FOIA contained, in the views of many, weaknesses which detracted from its ideal operation. In response, the courts fashioned certain procedural devices, such as the requirement of a "Vaughn Index"--a detailed index of withheld documents and the justification for their exemption, established in Vaughn v. Rosen³⁹--and the requirement that agencies release segregable nonexempt portions of a partially exempt record, first established in EPA v. Mink.⁴⁰

In an effort to further extend the FOIA's disclosure requirements, and also as a reaction to the abuses of the "Watergate era," the FOIA was substantially amended in 1974. The 1974 FOIA amendments considerably narrowed the overall scope of the Act's law enforcement and national security exemptions and broadened many of its procedural provisions, such as those relating to fees, time

³⁴(...continued)

policy activities, including its "ombudsman" function); see also FOIA Update, Fall 1987, at 2 (further description of same).

³⁵ See FOIA Update, Summer 1997, at 3-7 ("OIP Guidance: Guidelines for Agency Preparation and Submission of Annual FOIA Reports") (citing 5 U.S.C.A. § 552(e)(1)-(3)); see also FOIA Update, Fall 1996, at 11 (setting forth effective dates for annual report provisions of Electronic FOIA amendments).

³⁶ 5 U.S.C.A. § 552(f) (West 1996 & Supp. 1997).

³⁷ Id. § 552(g) (West 1996 & Supp. 1997).

³⁸ See FOIA Update, Fall 1996, at 11 (discussing new statutory requirement); see also FOIA Update, Spring 1997, at 1 (discussing electronic publication of Justice Department's FOIA Reference Guide).

³⁹ 484 F.2d 820, 827 (D.C. Cir. 1973).

⁴⁰ 410 U.S. 73, 91 (1973); see 5 U.S.C. § 552(b) (sentence immediately following exemptions) (explicitly requiring disclosure of any "reasonably segregable" nonexempt information); see also FOIA Update, Summer/Fall 1993, at 11-12 ("OIP Guidance: The 'Reasonable Segregation' Obligation"); cf. FOIA Update, Winter 1996, at 1-2 (describing agency use of document imaging in automated FOIA processing).

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limits, segregability, and in camera inspection by the courts.

In 1976, Congress again limited what could be withheld as exempt from disclosure under the FOIA, this time by narrowing its incorporation of the disclosure prohibitions of other statutes. (See discussion of Exemption 3, below.) A technical change was made in 1978 to update the FOIA's provision for administrative disciplinary proceedings,⁴¹ and in 1984 Congress repealed the expedited court-review provision previously contained in former subsection (a)(4)(D) of the Act.⁴²

In 1986, after many years of administrative experience with the FOIA demonstrated that the Act was in need of both substantive and procedural reform,⁴³ Congress enacted the Freedom of Information Reform Act of 1986,⁴⁴ which amended the FOIA to provide broader exemption protection for law enforcement information, plus special law enforcement record exclusions, and also created a new fee and fee waiver structure.⁴⁵ While all of the law enforcement provisions of the 1986 FOIA amendments became effective immediately, the revised fee and fee waiver provisions became effective as of mid-1987, with implementing regulations required for full effectiveness.⁴⁶ The Department of Justice and other federal agencies took a number of different steps to implement the provisions of the 1986 FOIA amendments.⁴⁷

In October 1996, after several years of legislative consideration of "elec-

⁴¹ 5 U.S.C. § 552(a)(4)(F).

⁴² See Federal Courts Improvement Act of 1984, Pub. L. No. 98-620, § 402, 98 Stat. 3335, 3357 (1984) (codified at 28 U.S.C. § 1657 (1994)) (repealing provision formerly codified at 5 U.S.C. § 552(a)(4)(D)); see also FOIA Update, Spring 1985, at 6.

⁴³ See generally Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. (1981) (two volumes); see also FOIA Update, Spring 1986, at 1; FOIA Update, Fall 1984, at 1; FOIA Update, Summer 1984, at 1, 4; FOIA Update, Winter 1984, at 1, 6; FOIA Update, Summer 1983, at 1-2; FOIA Update, Spring 1983, at 1; FOIA Update, June 1982, at 1-2; FOIA Update, March 1982, at 1-2; FOIA Update, Dec. 1981, at 1-2, 3-8; FOIA Update, Sept. 1981, at 1-2; FOIA Update, June 1981, at 1-2.

⁴⁴ Pub. L. No. 99-570, 100 Stat. 3207.

⁴⁵ See FOIA Update, Fall 1986, at 1-2; see also id. at 3-6 (setting out statute in its amended form, interlineated to show exact changes made).

⁴⁶ See FOIA Update, Winter/Spring 1987, at 1-2.

⁴⁷ See id.; FOIA Update, Summer 1988, at 1-14; FOIA Update, Winter 1988, at 2.

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tronic record" issues,⁴⁸ Congress enacted the Electronic Freedom of Information Act Amendments of 1996,⁴⁹ which addressed the subject of electronic records, as well as the subject areas of FOIA reading rooms and agency backlogs of FOIA requests, among other procedural provisions.⁵⁰ Some of the provisions of the Electronic FOIA amendments became effective as of March 31, 1997, some provisions become effective as of October 2, 1997, and some reading room provisions and annual reporting provisions do not take effect until later dates.⁵¹ (See discussions of the provisions of the Electronic FOIA amendments under FOIA Reading Rooms, Procedural Requirements, Fees and Fee Waivers, and Litigation Considerations, below.) The Department of Justice and other federal agencies have taken a number of different steps to implement the provisions of the Electronic FOIA amendments.⁵²

Another significant Freedom of Information Act development was the issuance in October 1993 of statements of new FOIA policy by both President Clinton⁵³ and Attorney General Janet Reno,⁵⁴ which together established a strong

⁴⁸ See, e.g., FOIA Update, Spring 1992, at 1, 3-10 (legislative testimony discussing need to modify FOIA to accommodate "electronic record" environment); see FOIA Update, Summer 1996, at 1-2 (describing electronic record legislative proposal); FOIA Update, Spring 1996, at 1 (same); see also FOIA Update, Fall 1994, at 1-6; FOIA Update, Summer 1994, at 1-2; FOIA Update, Winter 1994, at 1; FOIA Update, Fall 1991, at 1-2.

⁴⁹ Pub. L. No. 104-231, 110 Stat. 3048.

⁵⁰ See FOIA Update, Fall 1996, at 1-2, 10-11 (discussing statutory changes); see also id. at 3-9 (setting out statute in its amended form, interlineated to show exact changes made).

⁵¹ See FOIA Update, Fall 1996, at 11 (chart showing different effective dates for Electronic FOIA amendments' different provisions, ranging from March 31, 1997, to December 31, 1999).

⁵² See, e.g., Revised Department of Justice Freedom of Information Act Regulations, 62 Fed. Reg. 45,184 (1997) (to be codified at 28 C.F.R. pt. 16) (proposed Aug. 26, 1997); see also FOIA Update, Summer 1997, at 1-2 (describing agency implementation activities involving development of World Wide Web sites); id. at 3-7 (Justice Department guidelines on implementation of new annual reporting requirements); FOIA Update, Spring 1997, at 1 (describing Justice Department implementation activities, including development of FOIA reference guide); id. at 2 (addressing amendment implementation questions); FOIA Update, Winter 1997, at 3-7 (same); FOIA Update, Fall 1996, at 1-11.

⁵³ President Clinton's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 3.

⁵⁴ Attorney General's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act (Oct. 4, 1993) [hereinafter Attorney General Reno's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall (continued...)

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new spirit of openness in government under the FOIA.⁵⁵ In conjunction with President Clinton's call upon all agencies to follow "the spirit" as well as the letter of the Act,⁵⁶ Attorney General Reno's FOIA Memorandum articulated the FOIA's "primary objective"--that of achieving "maximum responsible disclosure of government information."⁵⁷

Among other things toward that disclosure objective, Attorney General Reno's FOIA Memorandum (1) rescinded the Department of Justice's previous standard for the defense of FOIA litigation; (2) established a new "foreseeable harm" standard applicable to the use of FOIA exemptions both in litigation and at the administrative level; and (3) strongly encouraged the making of discretionary disclosures of exempt information "whenever possible under the Act."⁵⁸ (See further discussions of these FOIA policy principles under Exemption 5, Application of the "Foreseeable Harm" Standard, below; Discretionary Disclosure and Waiver, below; and Litigation Considerations, below.) These FOIA-disclosure policies are being implemented by agencies throughout the federal government as part of a range of related openness-in-government initiatives undertaken by the Department of Justice.⁵⁹

In sum, the FOIA is a vital, continuously developing mechanism which, with necessary refinements to accommodate both technological advancements and society's interests in an open and fully responsible government, can truly enhance our democratic way of life.

⁵⁴(...continued)
1993, at 4-5.

⁵⁵ See FOIA Update, Summer/Fall 1993, at 1-2.

⁵⁶ President Clinton's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 3; see also FOIA Update, Summer/Fall 1993, at 1 (describing other aspects of President Clinton's FOIA Memorandum).

⁵⁷ Attorney General Reno's FOIA Memorandum, reprinted in FOIA Update, Summer/Fall 1993, at 4-5; see also FOIA Update, Spring 1997, at 1 (discussing Attorney General's reiteration of importance of "openness-in-government principles" to all agencies).

⁵⁸ Id.; see also FOIA Update, Summer/Fall 1993, at 5 (follow-up Attorney General memorandum urging "new institutional attitude toward FOIA administration").

⁵⁹ See FOIA Update, Spring 1994, at 1-2; see also FOIA Update, Summer 1996, at 7; FOIA Update, Fall 1995, at 1; FOIA Update, Winter 1995, at 1-2; FOIA Update, Fall 1994, at 7; FOIA Update, Summer/Fall 1993, at 2, 10, 12; cf. FOIA Update, Summer 1994, at 6 (describing National Performance Review FOIA activities at Justice Department).

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Subsection (a)(2) of the FOIA¹ provides for what is commonly referred to as "reading room" access.² It applies to certain basic agency records that, while not automatically published under subsection (a)(1) of the Act,³ must routinely be made "available for public inspection and copying" in agency reading rooms.⁴ Historically under the FOIA, three categories of records--"final opinions" rendered in the adjudication of administrative cases,⁵ specific agency policy statements,⁶ and certain administrative staff manuals⁷--have been made available

¹ 5 U.S.C. § 552(a)(2) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552 (West 1996 & Supp. 1997).

² See FOIA Update, Summer 1992, at 3-4 ("OIP Guidance: The `Automatic' Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)").

³ 5 U.S.C. § 552(a)(1) (providing for Federal Register publication of very basic agency records, as discussed under Introduction, above).

⁴ 5 U.S.C. § 552(a)(2); see Jordan v. United States Dep't of Justice, 591 F.2d 753, 756 (D.C. Cir. 1978) (en banc) (observing that subsection (a)(2) records must be made "automatically available for public inspection; no demand is necessary"); see also FOIA Update, Winter 1997, at 4 (advising that large agencies with decentralized FOIA operations may maintain separate reading rooms for agency components).

⁵ 5 U.S.C. § 552(a)(2)(A); see, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 155-59 (1975) (holding that NLRB advice and appeals memoranda deciding not to file unfair labor complaint was "final opinion" when decision not to file effectively put an end to formal complaint procedure); National Prison Project v. Sigler, 390 F. Supp. 789, 792-93 (D.D.C. 1975) (determining that parole board decisions denying inmate applications for parole were "reading room" records).

⁶ See 5 U.S.C. § 552(a)(2)(B); see, e.g., Bailey v. Sullivan, 885 F.2d 52, 62 (3d Cir. 1977) (stating that Social Security rule providing examples of medical conditions to be treated as "per se nonsevere" fell under subsection (a)(2)(B)); Tax Analysts v. IRS, No. 94-923, 1996 U.S. Dist. LEXIS 3259, at *9 (D.D.C. Mar. 15, 1996) (holding that IRS Field Service Advice Memoranda, even when not binding on IRS personnel, were "statements of policy"), aff'd, 117 F.3d 607 (D.C. Cir. 1997); Public Citizen v. Office of United States Trade Representative, 804 F. Supp. 385, 387 (D.D.C. 1992) (concluding that USTR submissions to GATT panel containing agency's interpretation of U.S.'s international legal obligations were "statements of policy and interpretations adopted by the USTR").

⁷ See 5 U.S.C. § 552(a)(2)(C); see, e.g., Sladek v. Bensinger, 605 F.2d 899, 901 (5th Cir. 1979) (finding portions of DEA agents' manual concerning treatment of confidential informants and search warrant procedures to be subsection (a)(2)(C) records); Stokes v. Brennan, 476 F.2d 699, 701 (5th Cir. 1973) (determining that "Training Course for Compliance Safety and Health Officers,"

(continued...)

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in agency reading rooms.⁸ Such records must be indexed by agencies in order to facilitate the public's access to them.⁹

Public access to such records serves to guard against the development of agency "secret law" known to agency personnel but not to members of the public who deal with agencies.¹⁰ Additionally, agencies have made use of their FOIA reading rooms in achieving efficient "affirmative" disclosure of records that otherwise would be sought through less efficient FOIA requests.¹¹ In so doing, however, they must be mindful of the distinction between subsection (a)(2)

⁷(...continued)

including all instructor and student manuals, training slides, films, and visual aids, must be made available for public inspection and copying); Firestone Tire & Rubber Co. v. Coleman, 432 F. Supp. 1359, 1364-65 (N.D. Ohio 1976) (ruling that memoranda approved by Office of Standards Enforcement, which set forth agency's policy regarding sampling plans that office must follow when tire fails lab test under Federal Motor Vehicle Safety Standard were "reading room" records).

⁸ See FOIA Update, Summer 1992, at 4. But see FOIA Update, Fall 1996, at 1 (noting that reading room obligation does not apply to any records that "are promptly published and [are] offered for sale") (quoting 5 U.S.C. § 552(a)(2)).

⁹ See 5 U.S.C.A. § 552(a)(2) (West 1996 & Supp. 1997); see, e.g., Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979) (requiring agency to provide "reasonable index" of requested decisions); Taxation With Representation Fund v. IRS, 2 Gov't Disclosure Serv. (P-H) ¶ 81,028, at 81,080 (D.D.C. Apr. 22, 1980) (recognizing agency's "continuing duty" to make subsection (a)(2) records and indices available); see also FOIA Update, Fall 1996, at 2 (discussing statutory indexing requirements under Electronic FOIA amendments).

¹⁰ See, e.g., Sears, 421 U.S. at 153-54; Skelton v. Postal Serv., 678 F.2d 35, 41 (5th Cir. 1982) ("That requirement was designed to help the citizen find agency statements 'having precedential significance' when he becomes involved in `a controversy with an agency.'" (quoting H.R. Rep. No. 89-1497, at 8 (1966))); see also Vietnam Veterans of America v. Department of the Navy, 876 F.2d 164, 165 (D.C. Cir. 1989) (finding that opinions in which Judge Advocates General of Army and Navy have authority only to dispense legal advice--rendered in subject areas for which those officials do not have authority to act on behalf of agency--were not "statements of policy or interpretations adopted by" the agencies and were not required to be published or made available for public inspection); see also FOIA Update, Summer 1992, at 4 (noting that "an agency may withhold any record or record portion falling within subsection (a)(2) . . . if it is of such sensitivity as to fall within a FOIA exemption") (citing, e.g., Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 n.21 (1975)).

¹¹ See FOIA Update, Winter 1995, at 1-2 (promoting "affirmative" agency disclosure practices through "reading room" access, among other means).

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records and subsection (a)(3) records under the Act.¹²

The Electronic Freedom of Information Act Amendments of 1996¹³ substantially modified the requirements of subsection (a)(2) by creating a fourth category of "reading room" records,¹⁴ and by establishing a requirement for the electronic availability of "reading room" records in what may be regarded as "electronic reading rooms."¹⁵ The first of these two modifications took effect on March 31, 1997, and the second takes effect on November 1, 1997.¹⁶

In addition to the traditional three categories of "reading room" records discussed above, agencies now must also include any records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."¹⁷ Under this new provision, when records are disclosed in response to a FOIA request, an agency is required to determine if they have become the subject of subsequent FOIA requests or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future.¹⁸ If either is the case, then those records in their FOIA-processed form will become "reading

¹² See, e.g., FOIA Update, Winter 1995, at 2 (reminding that "an agency cannot convert a subsection (a)(3) record into a subsection (a)(2) record (which cannot be the subject of a FOIA request under subsection (a)(3)) just by voluntarily placing it into its reading room"); FOIA Update, Spring 1991, at 5 (advising that FOIA requesters may not be deprived of subsection (a)(3) access rights through voluntary "reading room" availability); see also Reeves v. United States, No. 94-1291, slip op. at 3-4 (E.D. Cal. Nov. 10, 1994) (describing different treatment of subsection (a)(1), (a)(2), and (a)(3) records under Act). But see FOIA Update, Winter 1997, at 3 (advising of exception to general rule for records in new fourth reading room category under Electronic FOIA amendments).

¹³ 5 U.S.C.A. § 552 (West 1996 & Supp. 1997).

¹⁴ See id. § 552(a)(2)(D) (West 1996 & Supp. 1997).

¹⁵ See id. § 552(a)(2) (West 1996 & Supp. 1997); see also FOIA Update, Fall 1996, at 1-2 (discussing statutory changes).

¹⁶ See FOIA Update, Fall 1996, at 11 (including chart showing different effective dates for different amendment provisions).

¹⁷ 5 U.S.C.A. § 552(a)(2)(D) (West 1996 & Supp. 1997). But see FOIA Update, Spring 1997, at 2 (advising that agencies need not include records processed for contemporaneous multiple requests if they are not likely to be requested again, e.g., certain types of government contract submissions).

¹⁸ See FOIA Update, Winter 1997, at 3-4 (advising on processes for exercise of agency judgment under new reading room category).

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room" records to be made automatically available to potential FOIA requesters.¹⁹ Ideally, this availability will satisfy much of the future public demand for those processed records in a more efficient fashion.²⁰ Nevertheless, any subsequent FOIA request received for such records will have to be responded to in the conventional way as well, if the requester so chooses.²¹

Furthermore, the Electronic FOIA amendments will require agencies to use electronic information technology to enhance the availability of their "reading room" records: Agencies must make their newly created "reading room" records (i.e., records created by agencies on or after November 1, 1996,²² in all four reading room categories) available to the public by "electronic means."²³ The Electronic FOIA amendments embody a strong statutory preference that this new electronic availability be provided by agencies in the form of online access, which can be most efficient for both agencies and the public alike.²⁴ Under the Electronic FOIA amendments, agencies should have Internet or World Wide Web sites prepared to serve this "electronic reading room" function as of November 1, 1997.²⁵

¹⁹ See FOIA Update, Fall 1996, at 1-2. But see FOIA Update, Winter 1997, at 3 (cautioning that any information about any first-party requester that would not be disclosed to any other FOIA requester, such as information protected by Privacy Act of 1974 or Trade Secrets Act, would not be appropriate for automatic public disclosure under new reading room category).

²⁰ See FOIA Update, Spring 1997, at 2 (citing H.R. Rep. No. 104-795, at 21 (1996)); FOIA Update, Fall 1996, at 1 (emphasizing connection between new reading room category and new "electronic reading room" mechanism in meeting public access demands).

²¹ See FOIA Update, Winter 1997, at 3 (advising that while ordinary rule is that records placed in reading room under subsection (a)(2) cannot be subject of regular FOIA request, Congress made clear that such rule does not apply to new reading room category of FOIA-processed records) (citing H.R. Rep. No. 104-795, at 21 (1996)).

²² See 5 U.S.C.A. § 552(a)(2) (West 1996 & Supp. 1997); see also FOIA Update, Winter 1997, at 4-5.

²³ 5 U.S.C.A. § 552(a)(2) (West 1996 & Supp. 1997); see FOIA Update, Winter 1997, at 3 (advising that records made available in "electronic reading rooms" must nevertheless be made available in conventional "paper" reading rooms as well) (citing H.R. Rep. No. 104-795, at 21 (1996)); see also id. (suggesting that computer terminals may be used to facilitate such reading room access).

²⁴ See 5 U.S.C.A. § 552(a)(2) (stressing use of "computer telecommunications") (West 1996 & Supp. 1997); see, e.g., FOIA Update, Summer 1997, at 1-2 (describing efficiency of online public access).

²⁵ 5 U.S.C.A. § 552(a)(2) (West 1996 & Supp. 1997); see FOIA Update, Summer 1997, at 1-2 (describing agency development of World Wide Web sites

(continued...)

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Agencies must therefore place in their conventional "paper" reading rooms copies of any FOIA-processed records determined to fall within the new fourth subsection (a)(2) category,²⁶ and must identify such records that were created by them on or after the November 1, 1996 cut-off date in order to make them available through their "electronic reading rooms" as well.²⁷ In doing so, they should be mindful that some of the records falling under this new fourth category might not have been created by the agency and instead might have been generated elsewhere; while such records may be determined by the agency to fall within new subsection (a)(2)(D), they are not "created" by the agency and should not be regarded as subject to the new electronic availability requirement.²⁸ However, an agency may as a matter of administrative discretion choose to make such records available electronically even though they were not generated by the agency, or created after November 1, 1996, where to do so would be most cost-effective in serving public access needs under subsection (a)(2)(D).²⁹

Agencies also should make clear to the users of their "electronic reading rooms" that while all of their subsection (a)(2) records are available in their conventional reading rooms, generally only those records created on or after November 1, 1996 are available in their electronic ones.³⁰ In addition, they

²⁵(...continued)

for "electronic reading room" purposes); FOIA Update, Winter 1997, at 4 (setting forth statutory deadline for "electronic reading room" availability); see also id. (advising that agencies with separate "electronic reading rooms" for separate components "should ensure that [they] are linked together electronically so as to facilitate efficient user access").

²⁶ See FOIA Update, Winter 1997, at 4 (advising that agencies may determine that records no longer fall within new reading room category after passage of time).

²⁷ See FOIA Update, Winter 1997, at 5 (advising that redaction of record during FOIA processing does not amount to record "creation" for purposes of determining applicability of electronic availability requirement); FOIA Update, Fall 1996, at 2 (observing that in case of FOIA-processed records, very large proportion of those records will have been created prior to November 1, 1996 cut-off date, at least as of outset of new law's implementation, and therefore will not be subject to electronic availability requirement).

²⁸ See FOIA Update, Winter 1997, at 4-5 (citing United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144 (1989)).

²⁹ But see FOIA Update, Winter 1997, at 5 (cautioning agencies to guard against possibility that "electronic reading room" treatment of record generated by outside party might be regarded as copyright infringement by that party).

³⁰ See FOIA Update, Fall 1996, at 2; see also FOIA Update, Spring 1997, at 2 (advising agencies on practical treatment of written signatures on adjudicatory orders for "electronic reading room" purposes).

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should utilize indices to facilitate use of both types of reading rooms;³¹ in fact, they are required by the Electronic FOIA amendments to maintain an index of the FOIA-processed records in the new fourth reading room category and to make it available online by December 31, 1999.³²

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The Freedom of Information Act applies to "records" maintained by "agencies" within the executive branch of the federal government, including the Executive Office of the President and independent regulatory agencies.¹ Not included are records maintained by state governments,² by municipal corporations,³ by the courts,⁴ by Congress,⁵ or by private citizens.⁶

³¹ See FOIA Update, Winter 1997, at 3; cf. FOIA Update, Summer 1997, at 1-2 (describing agency use of "home pages" and electronic "links" for FOIA purposes on agency World Wide Web sites).

³² 5 U.S.C.A. § 552(a)(2)(E) (West 1996 & Supp. 1997); cf. FOIA Update, Summer 1997, at 3-7 (setting forth Justice Department guidelines for agency preparation and submission of new form of agency annual FOIA reports, which should be prepared by all agencies electronically and made available on World Wide Web as of 1999).

¹ 5 U.S.C. § 552(f) (1994), as amended by Electronic Freedom of Information Act Amendments of 1996, 5 U.S.C.A. § 552(f)(1) (West 1996 & Supp. 1997).

² See, e.g., Ortez v. Washington County, 88 F.3d 804, 811 (9th Cir. 1996); Davidson v. Georgia, 622 F.2d 895, 897 (5th Cir. 1980); Martinson v. Violent Drug Traffickers Project, No. 95-2161, 1996 WL 411590, at *2 (D.D.C. July 11, 1996) (appeal pending); see also Beard v. Department of Justice, 917 F. Supp. 61, 63 (D.D.C. 1996) (holding District of Columbia Police Department to be "local" law enforcement agency not subject to FOIA); Gillard v. United States Marshals Serv., No. 87-0689, slip op. at 1-2 (D.D.C. May 11, 1987) (stating that District of Columbia Government records are not covered).

³ See, e.g., Rankel v. Town of Greensburgh, 117 F.R.D. 50, 54 (S.D.N.Y. 1987).

⁴ See, e.g., Warth v. Department of Justice, 595 F.2d 521, 523 (9th Cir. 1979); Williams v. Thornburgh, No. 89-2152, slip op. at 2 n.2 (D.D.C. Mar. 24, 1992), summary affirmance granted sub nom. Williams v. Barr, No. 92-5149 (D.C. Cir. Jan. 29, 1993); see also Andrade v. United States Sentencing Comm'n, 989 F.2d 308, 309-10 (9th Cir. 1993) (determining that Sentencing Commission, an independent body within judicial branch, is not subject to FOIA); Butler v. United States Probation, No. 95-1705, 1996 U.S. Dist. LEXIS 5241, at *2 (D.D.C. Apr. 22, 1996) (concluding that U.S. Probation Department is not agency within meaning of FOIA).

⁵ See, e.g., Smith v. United States Congress, No. 95-5281, 1996 WL 523800, (continued...)

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In general, the FOIA does not apply to entities that "are neither chartered by the federal government [n]or controlled by it."⁷ Nor does the FOIA apply to a presidential transition team.⁸

⁵(...continued)

at *1 (D.C. Cir. Aug. 28, 1996) (stating that FOIA does not apply to records held by Congress); Goland v. CIA, 607 F.2d 339, 348 (D.C. Cir. 1978) (holding that hearing transcript is congressional document and not subject to FOIA); Dow Jones & Co. v. Department of Justice, 917 F.2d 571, 574 (D.C. Cir. 1990) (holding that Congress is not "agency" for any purpose under FOIA); see also Mayo v. United States Gov't Printing Office, 9 F.3d 1450, 1451 (9th Cir. 1994) (deciding that Government Printing Office is part of congressional branch and therefore is not subject to FOIA); Owens v. Warner, No. 93-2195, slip op. at 1 (D.D.C. Nov. 24, 1993) (ruling that office of Senator John Warner is not subject to FOIA), summary affirmance granted, No. 93-5415 (D.C. Cir. May 25, 1994).

⁶ See, e.g., Buemi v. Lewis, No. 94-4156, 1995 U.S. App. LEXIS 7816, at *6 (6th Cir. Apr. 4, 1995).

⁷ H.R. Rep. No. 93-1380, at 14 (1974); see, e.g., Forsham v. Harris, 445 U.S. 169, 179-80 (1980) (holding that private grantee of federal agency is not subject to FOIA); Public Citizen Health Research Group v. HEW, 668 F.2d 537, 543-44 (D.C. Cir. 1981) (stating that medical peer review committees are not "agencies" under FOIA); Irwin Mem'l Blood Bank v. American Nat'l Red Cross, 640 F.2d 1051, 1057 (9th Cir. 1981) (determining that American Red Cross is not an "agency" under FOIA); Leytman v. New York Stock Exch., No. 95 CV 902, 1995 WL 761843, at *2 (E.D.N.Y. Dec. 6, 1995) (relying on Independent Investor Protective League v. New York Stock Exch., 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973), finding that although "[t]he Exchange is subject to significant federal regulation, . . . it is not an agency of the federal government"); Rogers v. United States Nat'l Reconnaissance Office, No. 94-B-2934, slip op. at 7 (N.D. Ala. Sept. 13, 1995) ("[T]he degree of government involvement and control over [private organizations which contracted with government to construct office facility is] insufficient to establish companies as federal agencies for purposes of the FOIA."); But see Cotton v. Adams, 798 F. Supp. 22, 24 (D.D.C. 1992) (holding that Smithsonian Institution is "agency" under FOIA on basis that it "performs governmental functions as a center of scholarship and national museum responsible for the safe-keeping and maintenance of national treasures"), holding questioned on appeal of award of attorneys fees sub nom. Cotton v. Heyman, 63 F.3d 1115, 1123 (D.C. Cir. 1995) (noting that Smithsonian Institution could "reasonably interpret our precedent to support its position that it is not an agency under FOIA"); Association of Community Orgs. for Reform Now v. Barclay, No. 3-89-409T, slip op. at 8 (N.D. Tex. June 9, 1989) (holding federal home loan banks "agencies" under FOIA); cf. Dong v. Smithsonian Instit., 878 F. Supp. 244, 250 (D.D.C. 1995) (ruling that Smithsonian Institution is "agency" under Privacy Act) (appeal pending).

⁸ See Illinois Inst. for Continuing Legal Educ. v. United States Dep't of Labor, 545 F. Supp. 1229, 1232-33 (N.D. Ill. 1982); see also FOIA Update, Fall 1988, at (continued...)

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The personal staff of the President⁹ and units within the Executive Office of the President whose sole function is to advise and assist the President are not intended to fall within the definition of "agency."¹⁰ The Court of Appeals for the District of Columbia Circuit illustrated this point in holding that the former Presidential Task Force on Regulatory Relief--chaired by the Vice President and composed of several cabinet members--was not an agency for purposes of the FOIA, as the cabinet members were not acting as heads of their departments "but rather as the functional equivalents of assistants to the President."¹¹ Further, the D.C. Circuit recently evaluated the structure of the National Security Council, its proximity to the President, and the nature of the authority delegated to it, and it determined that the National Security Council is not an agency subject to the FOIA.¹²

⁸(...continued)

3-4 ("FOIA Counselor: Transition Team FOIA Issues").

⁹ See Sweetland v. Walters, 60 F.3d 852, 855-56 (D.C. Cir. 1995) (holding that Executive Residence staff, which is "exclusively dedicated to assisting the President in maintaining his home and carrying out his various ceremonial duties," is not "agency" under FOIA); cf. Katz v. National Archives & Records Admin., 68 F.3d 1438, 1442 (D.C. Cir. 1995) (finding that autopsy x-rays and photographs of President Kennedy, created and handled as personal property of Kennedy estate, are presidential papers, not records of any "agency").

¹⁰ See S. Conf. Rep. No. 93-1200, at 14 (1974), reprinted in 1974 U.S.C.C.A.N. 6285, 6293; see, e.g., Rushforth v. Council of Econ. Advisers, 762 F.2d 1038, 1042-43 (D.C. Cir. 1985) (ruling that Council of Economic Advisers is not "agency" under FOIA); Nation Co. v. Archivist of the United States, No. 88-1939, slip op. at 5-6 (D.D.C. July 24, 1990) (finding that Tower Commission is not "agency" under FOIA); National Sec. Archive v. Executive Office of the President, 688 F. Supp. 29, 31 (D.D.C. 1988) (concluding that Office of Counsel to President is not "agency" under FOIA), aff'd sub nom. National Sec. Archive v. Archivist of the United States, 909 F.2d 541 (D.C. Cir. 1990); see also FOIA Update, Summer/Fall 1993, at 6-8 (Department of Justice memorandum specifying consultation process for agencies possessing White House-originated records or information located in response to FOIA requests).

¹¹ Meyer v. Bush, 981 F.2d 1288, 1294 (D.C. Cir. 1993); cf. Association of Am. Physicians & Surgeons v. Clinton, 997 F.2d 898, 911 (D.C. Cir. 1993) (declaring that President's Task Force on National Health Care Reform, composed of cabinet officials and chaired by First Lady, is not subject to Federal Advisory Committee Act); Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 8 (D.D.C. 1995) (holding that trust to assist President Clinton with personal legal expenses "established by a government officer [President Clinton] in his personal capacity without the use of public funds, and which renders absolutely no advice on official government policy" is not subject to Federal Advisory Committee Act), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

¹² Armstrong v. Executive Office of the President, 90 F.3d 553, 559-65 (D.C.

(continued...)

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However, such government entities whose functions are not limited to advising and assisting the President are "agencies" under the FOIA.¹³ For example, the D.C. Circuit, after examining the responsibilities of one entity in the Executive Office of the President in detail, concluded that its investigatory, evaluative, and recommendatory functions exceeded merely advising the President and that it therefore was an "agency" subject to the FOIA.¹⁴

The Supreme Court has articulated a basic, two-part test for determining what constitutes an "agency record" under the FOIA: "Agency records" are documents which are (1) either created or obtained by an agency, and (2) under agency control at the time of the FOIA request.¹⁵ The D.C. Circuit has provided comprehensive discussions of relevant factors and precedents regarding the

¹²(...continued)

Cir. 1996), cert. denied, 117 S. Ct. 1842 (1997).

¹³ See Soucie v. David, 448 F.2d 1067, 1075 (D.C. Cir. 1971); see also Ryan v. Department of Justice, 617 F.2d 781, 784-89 (D.C. Cir. 1980).

¹⁴ Pacific Legal Found. v. Council on Env'tl. Quality, 636 F.2d 1259, 1263 (D.C. Cir. 1980) (holding that Council on Environmental Quality is "agency" under FOIA); cf. Energy Research Found. v. Defense Nuclear Facilities Safety Bd., 917 F.2d 581, 584-85 (D.C. Cir. 1990) (determining that Defense Nuclear Facilities Safety Board is "agency" because of multiple functions).

¹⁵ United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 144-45 (1989) (holding that court opinions in agency files are "agency records"); see, e.g., International Bhd. of Teamsters v. National Mediation Bd., 712 F.2d 1495, 1496 (D.C. Cir. 1983) (holding that submission of gummed-label mailing list as required by court order not sufficient to give "control" over record to agency); Tax Analysts v. United States Dep't of Justice, 913 F. Supp. 599, 607 (D.D.C. 1996) (finding that electronic legal research database contracted by agency is not "agency record" because licensing provisions specifically precluded agency control), aff'd, 107 F.3d 923 (D.C. Cir. 1997) (unpublished table decision); KDKA v. Thornburgh, No. 90-1536, slip op. at 11 (D.D.C. Sept. 30, 1992) (concluding that Canadian Safety Board report of aircrash, although possessed by National Transportation Safety Board, is not under agency "control" because of restrictions imposed by Convention on International Civil Aviation); Teich v. FDA, 751 F. Supp. 243, 248-49 (D.D.C. 1990) (holding that documents submitted to FDA in "legitimate conduct of its official duties" are agency records notwithstanding FDA's presubmission review regulation allowing submitters to withdraw their documents from agency's files (quoting Tax Analysts, 492 U.S. at 145)), appeal voluntarily dismissed, No. 91-5023 (D.C. Cir. July 2, 1992); Rush v. Department of State, 716 F. Supp. 598, 600 (S.D. Fla. 1989) (finding that correspondence between former ambassador and Henry Kissinger (then Assistant to the President) were "agency records" of Department of State as it exercised control over them); see also FOIA Update, Summer 1992, at 5 (advising that records subject to "protective order" issued by administrative law judge remain within agency control and are subject to FOIA).

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"agency record" concept¹⁶ and also regarding how certain records maintained by

¹⁶ See Burka v. HHS, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding data tapes created and possessed by contractor to be "agency records" because of extensive supervision exercised by agency which evidenced "constructive control"); Wolfe v. HHS, 711 F.2d 1077, 1079-82 (D.C. Cir. 1983) (holding that transition team records, physically maintained within "four walls" of agency, were not "agency records" under FOIA); see also, e.g., Tax Analysts, 492 U.S. at 146 (declaring that federal court tax opinions maintained and used by Justice Department's Tax Division are "agency records"); Hercules, Inc. v. Marsh, 839 F.2d 1027, 1029 (4th Cir. 1988) (holding that army ammunition plant telephone directory prepared by contractor at government expense, bearing "property of the U.S." legend, is "agency record"); General Elec. Co. v. NRC, 750 F.2d 1394, 1400-01 (7th Cir. 1984) (determining that agency "use" of internal report submitted in connection with licensing proceedings renders report an "agency record"); Chicago Tribune Co. v. HHS, No. 95-C-3917, 1997 U.S. Dist. LEXIS 2308, at *33 (N.D. Ill. Feb. 26, 1997) (magistrate's recommendation) (finding that notes and audit analysis file created by independent contractor were "agency records" as they were created on behalf of and at request of agency and agency maintained "effective control" over them), adopted (N.D. Ill. Mar. 28, 1997); see also Judicial Watch, 880 F. Supp. at 11-12 (following Washington Post v. DOD, 766 F. Supp. 1, 17 (D.D.C. 1991), finding transcript of congressional testimony provided "solely for editing purposes," with cover sheet restricting dissemination, is not "agency record"); Baizer v. United States Dep't of the Air Force, 887 F. Supp. 225, 228-29 (N.D. Cal. 1995) (holding that database of Supreme Court decisions, used for reference purposes or as research tool, is not "agency record"); Animal Legal Defense Fund v. Secretary of Agric., 813 F. Supp. 882, 892 (D.D.C. 1993) (ruling that plans regarding treatment of animals maintained on-site by entities subject to USDA regulation are not "agency records") (non-FOIA case brought under Administrative Procedure Act), vacated for lack of standing sub nom. Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994); Rush Franklin Publ'g, Inc. v. NASA, No. 90-CV-2855, slip op. at 10 (E.D.N.Y. Apr. 13, 1993) (finding that computer tape maintained by contractor is not "agency record" in absence of agency control); Lewisburg Prison Project, Inc. v. Federal Bureau of Prisons, No. 86-1339, slip op. at 4-5 (M.D. Pa. Dec. 16, 1986) (holding that training videotape provided by contractor is not "agency record"); Marzen v. HHS, 632 F. Supp. 785, 801 (N.D. Ill. 1985) (declaring that records created outside federal government which "agency in question obtained without legal authority" are not "agency records"), aff'd on other grounds, 825 F.2d 1148 (7th Cir. 1987); Waters v. Panama Canal Comm'n, No. 85-2029, slip op. at 5-6 (D.D.C. Nov. 26, 1985) (finding that Internal Revenue Code is not "agency record"); Center for Nat'l Sec. Studies v. CIA, 577 F. Supp. 584, 586-90 (D.D.C. 1983) (holding that agency report, prepared "at the direct request of Congress" with intent that it remain secret and transferred to agency with congressionally imposed "conditions" of secrecy, is not "agency record"); cf. SDC Dev. Corp. v. Mathews, 542 F.2d 1116, 1120 (9th Cir. 1976) (reaching "displacement-type" result for records governed by National Library of Medicine Act); FOIA Update, Fall 1990, at 7-8 n.32.

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agency employees may qualify as "personal" rather than "agency" records.¹⁷

¹⁷ See Gallant v. NLRB, 26 F.3d 168, 171-72 (D.C. Cir. 1994) (stating that letters written on agency time on agency equipment by board member seeking renomination, which had been reviewed by other agency employees but not integrated into agency record system and over which author had not relinquished control, are not "agency records"); Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice, 742 F.2d 1484, 1488-96 (D.C. Cir. 1984) (holding that appointment calendars and telephone message slips of agency official are not "agency records"); Spannaus v. United States Dep't of Justice, 942 F. Supp. 656, 658 (D.D.C. 1996) (finding that "'personal' files" of attorney no longer employed with agency were "beyond the reach of FOIA" if they were not turned over to agency at end of employment); Judicial Watch, 880 F. Supp. at 11 (concluding that "telephone logs, calendar markings, [and] personal staff notes" are not "agency records"); see also Hamrick v. Department of the Navy, No. 90-283, slip op. at 6 (D.D.C. Aug. 28, 1992) (finding that employee notebooks containing handwritten notes and comments, created and maintained for personal convenience and not placed in official files or referenced in agency documents, are not "agency records"), appeal dismissed, No. 92-5376 (D.C. Cir. Aug. 4, 1995); Sibille v. Federal Reserve Bank, 770 F. Supp. 134, 139 (S.D.N.Y. 1991) (ruling that handwritten notes of meetings and telephone conversations taken by employees for their personal convenience and not placed in agency's files are not "agency records"); Dow Jones & Co. v. GSA, 714 F. Supp. 35, 39 (D.D.C. 1989) (determining that agency head's recusal list, shared only with personal secretary and chief of staff, is not "agency record"); Forman v. Chapotan, No. 88-1151, slip op. at 14 (W.D. Okla. Dec. 12, 1988) (rejecting contention that materials distributed to agency officials at privately sponsored seminar are "agency records"), aff'd, No. 89-6035 (10th Cir. Oct. 31, 1989); American Fed'n of Gov't Employees v. United States Dep't of Commerce, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (finding that employee logs created voluntarily to facilitate work are not "agency records" even though containing substantive information), aff'd, 907 F.2d 203 (D.C. Cir. 1990); Kalmin v. Department of the Navy, 605 F. Supp. 1492, 1494-95 (D.D.C. 1985) (holding that uncirculated personal notes maintained at residence or in office desk drawer are personal property, not "agency records"); British Airports Auth. v. CAB, 531 F. Supp. 408, 416 (D.D.C. 1982) (ruling that employee notes maintained in personal file and retained at employee's discretion are not "agency records"); Porter County Chapter of the Izaak Walton League of Am. v. United States Atomic Energy Comm'n, 380 F. Supp. 630, 633 (N.D. Ind. 1974) (determining that handwritten notes within personal files are not "agency records"); see also FOIA Update, Fall 1988, at 3-4 (discussing circumstances under which presidential transition team documents can be regarded as "personal records" when brought to federal agency); FOIA Update, Fall 1984, at 3-4 ("OIP Guidance: `Agency Records' vs. `Personal Records'"). But see Washington Post Co. v. United States Dep't of State, 632 F. Supp. 607, 616 (D.D.C. 1986) (holding that logs compiled by Secretary of State's staff--without his knowledge--are "agency records"); see also Ethyl Corp. v. EPA, 25 F.3d 1241, 1247-48 (4th Cir. 1994) (finding agency search inadequate because employees "not properly instructed on how to distinguish personal records from

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Each federal agency is required to publish in the Federal Register its procedural regulations governing access to its records under the FOIA.¹⁸ These regulations must inform the public of where and how to address requests; its schedule of fees for search, review, and duplication; its fee waiver criteria; and its administrative appeal procedures.¹⁹ The Electronic Freedom of Information Act Amendments of 1996²⁰ affect several procedural aspects of FOIA administration--including matters pertaining to the timing of the processing of FOIA requests--which are discussed below.²¹ Each federal agency is required to promulgate implementing regulations in the Federal Register addressing these matters as well.²²

Although an agency may occasionally waive some aspect of its published procedures for reasons of public interest, speed, or simplicity, all agencies should be mindful that any "unnecessary bureaucratic hurdle has no place in [the Act's] implementation"²³ and that no requirement may be imposed on a requester beyond those prescribed in an agency's regulations.²⁴ Of course, agencies must strictly adhere to their own regulations when that is advantageous to the FOIA

¹⁷(...continued)
agency records").

¹⁸ See 5 U.S.C. § 552(a)(3), (a)(4)(A), (a)(6)(A); see also 5 U.S.C.A. § 552(g) (West 1996 & Supp. 1997) (requiring agencies to make available "reference material or a guide for requesting records or information from the agency"); FOIA Update, Spring 1997, at 1 (discussing electronic publication of Justice Department's FOIA Reference Guide).

¹⁹ See, e.g., 28 C.F.R. pt. 16 (1996) (Department of Justice FOIA regulations).

²⁰ 5 U.S.C.A. § 552 (West 1996 & Supp. 1997).

²¹ See FOIA Update, Fall 1996, at 1-2, 10-11 (discussing statutory changes).

²² 5 U.S.C.A. § 552(a)(6)(D), (a)(6)(E) (West 1996 & Supp. 1997); see, e.g., Revised Department of Justice Freedom of Information Act Regulations, 62 Fed. Reg. 45,184 (1997) (to be codified at 28 C.F.R. pt. 16) (proposed Aug. 26, 1997).

²³ President's Memorandum for Heads of Departments and Agencies regarding the Freedom of Information Act, 29 Weekly Comp. Pres. Doc. 1999 (Oct. 4, 1993) [hereinafter President Clinton's FOIA Memorandum], reprinted in FOIA Update, Summer/Fall 1993, at 3; see, e.g., FOIA Update, Summer 1994, at 6 (cautioning against practices that would cause unwarranted disadvantages to requesters in record-referral processes); see also FOIA Update, Spring 1997, at 1 (discussing Attorney General's reiteration of Administration's "openness-in-government principles").

²⁴ See Zemansky v. EPA, 767 F.2d 569, 574 (9th Cir. 1985); see also FOIA Update, Summer 1989, at 5 (addressing submission of FOIA requests by "fax" in relation to agency regulation).

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requester.²⁵ By the same token, a requester's failure to comply with an agency's procedural regulations governing access to records may be held to constitute a failure to properly exhaust administrative remedies.²⁶

²⁵ See, e.g., Ruotolo v. Department of Justice, 53 F.3d 4, 10 (2d Cir. 1995) (charging that agency failed to comply with its own regulation requiring it to assist requesters in reformulating requests determined not to reasonably describe records sought); Public Citizen Health Research Group v. FDA, No. 94-0018, slip op. at 2 (D.D.C. Feb. 9, 1996) (criticizing agency for asserting that request did not reasonably describe "records which could be located in the FDA's record keeping system without an unduly burdensome search" and ignoring plaintiff's concession to limit scope of request, court concluded that agency violated its own regulatory requirement to seek more specific information and to narrow scope of request).

²⁶ See, e.g., Pollack v. Department of Justice, 49 F.3d 115, 119 (4th Cir.) (plaintiff's refusal to pay anticipated fees constitutes failure to exhaust administrative remedies); Wells v. SEC, No. 96-6237, 1997 WL 274270, at *3 (2d Cir. May 22, 1997) (ruling that plaintiff failed to exhaust administrative remedies by neglecting to administratively appeal pursuant to agency regulations); Thomas v. Office of U.S. Attorney, 171 F.R.D. 53, 54 (E.D.N.Y. 1997) (ruling that administrative remedies not exhausted when plaintiff made further request for documents in appeal of agency's denial of plaintiff's initial request); Smith v. Reno, No. 93-1316, 1996 U.S. Dist. LEXIS 5594, at *9 (N.D. Cal. Apr. 23, 1996) (stating that "National Records Administration is not an HUD information center," and holding that plaintiff failed to exhaust administrative remedies by directing FOIA request to wrong agency) (appeal pending); Graphics of Key West v. United States, No. 93-718, 1996 U.S. Dist. LEXIS 1888, at **17-18 (D. Nev. Feb. 5, 1996) (finding that requests made to IRS employees are "more arguments than clear requests for information" and "do not even come close to constituting proper requests for information," court dismissed for failure to exhaust administrative remedies); Sands v. United States, No. 94-0537, 1995 U.S. Dist. LEXIS 9252, at **10-12 (S.D. Fla. June 16, 1995) (noting clarity of agency's rules and reasonableness of agency's treatment of misdirected request, court found that plaintiff failed to exhaust administrative remedies by not directing request to appropriate office); United States v. Agunbiade, No. 90-CR-610, 1995 WL 351058, at *6 (E.D.N.Y. May 10, 1995) (ruling that plaintiff who did not direct request to "appropriate parties and agencies" in accordance with agency-specific rules failed to exhaust administrative remedies), aff'd sub nom. United States v. Osinowo, 100 F.3d 942 (2d Cir. 1996) (unpublished table decision); Klayman v. United States Int'l Trade Comm'n, No. 95-0009, slip op. at 1 (D.D.C. Apr. 19, 1995) (stating that plaintiff failed to exhaust administrative remedies by failing to comply with agency regulations governing appeals); Polewsky v. Social Sec. Admin., No. 5:93-CV-200, slip op. at 8 (D. Vt. Mar. 31, 1995) (magistrate's recommendation) (noting that agency is not required to inform requesters of proper administrative procedures, other than through publication in Federal Register, and finding that plaintiff did not comply with agency regulations and therefore has not exhausted administrative remedies), adopted (D. Vt. Apr. 13, 1995), aff'd on other grounds, 101 F.3d 108 (2d Cir. 1996) (unpublished table decision).

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A FOIA request can be made by "any person," as defined in 5 U.S.C. § 551(2) (1994), which encompasses individuals (including foreign citizens), partnerships, corporations, associations and foreign or domestic governments.²⁷ The statute specifically excludes federal agencies from the definition of a "person,"²⁸ but state agencies certainly can make FOIA requests.²⁹ The only apparent exception of any significance to this broad "any person" standard

²⁷ See, e.g., Constangy, Brooks & Smith v. NLRB, 851 F.2d 839, 840 n.2 (6th Cir. 1988) (recognizing standing of attorney to request documents on behalf of client). See generally Doherty v. United States Dep't of Justice, 596 F. Supp. 423, 427 n.4 (S.D.N.Y. 1984) (reviewing legislative history), aff'd on other grounds, 775 F.2d 49 (2d Cir. 1985).

²⁸ See FOIA Update, Winter 1985, at 6 (citing 5 U.S.C. § 551(2)).

²⁹ See, e.g., Texas v. ICC, 935 F.2d 728, 728 (5th Cir. 1991); Massachusetts v. HHS, 727 F. Supp. 35, 35 (D. Mass. 1989).